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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Redan Management Corporation, Inc.

Serial No. 76/101,636

Daniel R. McClure of Thomas Kayden Horstemeyer & Risley,
LLP for Redan Management Corporation, Inc.

Jennifer D. Chicoski, Trademark Examining Attorney, Law
Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Hairston, Bucher and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Redan Management Corporation, Inc. seeks registration
on the Principal Register for the mark shown below:



used in connection with services recited as "automobile cleaning and washing," in International Class 37.¹

This case is now before the Board on appeal from the final refusal to register applicant's mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has held that applicant's mark, when used in connection with the identified services, so resembles the mark WINNER'S CIRCLE that is registered for "cleaning preparations for automotive use," in International Class 3,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant contends that the goods and services herein are different, that the channels of trade are not the same, that the marks are dissimilar, and that all the WINNER'S CIRCLE marks already co-existing on the federal trademark register mandate that the cited registration be accorded a

¹ Application Serial No. 76/101,636 was filed on August 2, 2000 based upon applicant's allegation of use in commerce since at least as early as September 1999.

² Registration No. 2,193,353, issued on October 6, 1998.

narrower range of protection than that accorded it by the Trademark Examining Attorney.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods and services, it is not necessary that registrant's goods and applicant's services be identical in order to support a finding of likelihood of confusion. It is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods and services originate from or are in some way associated with the same source. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

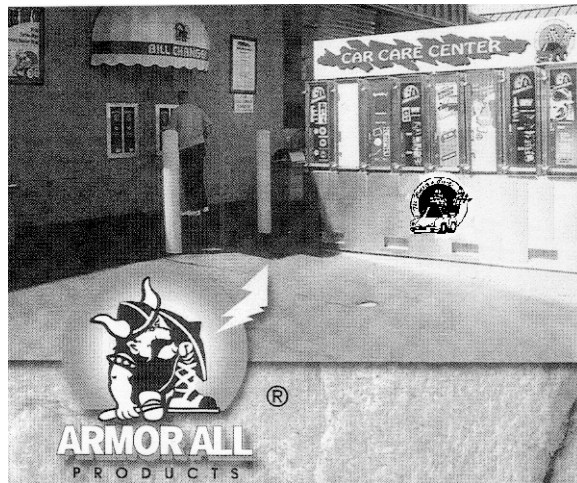
We find that applicant's automobile cleaning and washing services are closely related to registrant's

cleaning preparations for automotive use. As correctly argued by the Trademark Examining Attorney:

Here, the applicant's services clearly utilize cleaning preparations. The applicant submits that the cleaning products supplied are dispensed after coins are inserted into a machine "and the brand of the product dispensed is unknown to the user." Applicant's Response of August 21, 2001, at p. 6. Nevertheless, the applicant's specimens of use clearly show use of and even promote the marks of cleaning products that are also available for purchase in a variety of retail settings where car cleaning preparations are sold. The applicant's specimen uses the ARMOR ALL® marks and clearly shows the coin-operated cleaning stations as offering such products as options for use during the self-service cleaning. A customer of the applicant's services, familiar with the ARMOR ALL® family of car cleaning products, would believe that the products dispensed under such a mark are emanating from the same source as those products bearing such marks found in auto parts stores, discount department stores, hardware stores, etc. The reverse situation could occur when a consumer, familiar with the applicant's services, encounters the registrant's goods in an auto parts store and presumes, incorrectly, that there is a common source for the goods and the services. Similarly, if a consumer [who] was familiar with the registrant's goods came across the applicant's coin-operated cleaning stations bearing a highly similar mark, the consumer could mistakenly believe that the applicant's services are in some way sponsored by or authorized by the registrant.

The examining attorney has submitted evidence of the relatedness of these goods and services. Both are offered by common sources. As evidence of this, the examining attorney enclosed with the final Office action copies of eleven current use-based trademark registrations which include both cleaning preparations for vehicles and automobile cleaning and appearance maintenance services. This evidence shows that it would be reasonable for purchasers to expect both goods and services to emanate from common sources, often under the same trademark. *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); See *Sterling Drug Inc. v. Sebring*, 185 USPQ 649 (CCPA 1975).

Indeed, although applicant argues that, contrary to the position of the Trademark Examining Attorney, the chance for confusion is *de minimis* in this case, the close relationship of registrant's goods to applicant's services, and the overlap in the channels of trade seems to jump out from an image contained in applicant's specimen of record:



We turn then to the similarity of the marks. The cited trademark is WINNER'S CIRCLE. The only wording in applicant's service mark is THE WINNER'S CIRCLE. We recognize that applicant's composite mark, in addition to the words (THE WINNER'S CIRCLE) contains a circle, two checkered racing flags, and a happy, sparkling automobile. However, the only way in which consumers could call for this service would be by speaking the words, "The Winner's Circle." For this reason, as noted by the Trademark Examining Attorney, it is not an improper dissection of applicant's composite mark to give greater weight to this

literal portion of the mark in making a determination as to likelihood of confusion.

Finally, we turn to applicant's contention that the registered mark has been shown to be so weak that its scope of protection should be significantly narrowed. In support of this proposition, applicant attached to its appeal brief an exhibit consisting of forty-seven pages of a private trademark search. Applicant alleges that this exhibit contains twenty-eight federal registrations of marks including the term "Winner's Circle."

The Trademark Examining Attorney has correctly objected to the form and timing of this submission, and so we have not considered it in reaching our decision.³

However, even if we were to consider this exhibit, it would not change the result of this decision. In the absence of any evidence of actual use of those marks, such a search report is of little probative value in connection with a question of likelihood of confusion. The appearance

³ These alleged, third-party registrations were not properly made of record. In order to make third-party registrations of record, soft copies of the registrations or photocopies of the appropriate United States Patent and Trademark Office electronic printouts should be submitted. See Weyerhaeuser Co. v. Katz, 24 USPQ2d 1230 (TTAB 1992). This was not done. Furthermore, the printouts of the search results were merely an exhibit attached to applicant's appeal brief. Copies of the registrations are to be made part of the record prior to the time of the appeal. See, 37 CFR 2.142(d); In re Smith and Mehaffey, 31 USPQ2d 1531, 1532 (TTAB 1994).

of these third-party marks in trademark search results does not prove that they are in use in the marketplace, or that the public is familiar with them. Unless applicant establishes that the third-party marks shown in these computerized search results are being used, there is no way an assessment can be made as to what, if any, impact those marks may have made in the marketplace. Thus, we cannot assume that the public will come to distinguish between them. As the Court of Appeals for the Federal Circuit stated in the case of Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992):

"Under du Pont, '[t]he number and nature of similar marks in use on similar goods' is a factor that must be considered in determining likelihood of confusion. 476 F.2d at 1361, 177 USPQ at 567 (factor 6). Much of the undisputed record evidence relates to third party registrations, which admittedly are given little weight but which nevertheless are relevant when evaluating likelihood of confusion. As to strength of a mark, however, registration evidence may not be given any weight. AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269 (CCPA 1973) ('The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them. ...') [emphasis in original]."

See also Seabrook Foods, Inc. v. Bar-Well Foods, Limited, 568 F.2d 1342, 196 USPQ 289 (CCPA 1977).

Furthermore, none of the third-party registrations recites goods or services similar in any way to the services at issue herein. Thus, even if copies of these

registrations in the correct form had been timely entered, or if applicant had proven actual use of these particular marks by third parties, any actual uses on dissimilar goods or services in unrelated fields would be irrelevant. See Sheller-Globe Corporation v. Scott Paper Company, 204 USPQ 329 (TTAB 1979) and Charrette Corp. v. Bowater Communication Papers Inc., 13 USPQ2d 2040 (TTAB 1989). Specifically, the goods and services in these registrations are related to horses, advertising services, real estate contests, casinos, bourbon, cheerleaders' uniforms, toiletries, vegetables, window blinds, golfing equipment, trading cards and toys. In its brief, applicant specifically highlights the registration for toy vehicles. While this may well be the closest of twenty referenced extant registrations containing the words "Winner's Circle," it is not nearly as closely related to either registrant's goods or to applicant's services as these latter two are related to each other. Accordingly, even if we were to consider these registrations, applicant has not even established conceptually that the cited mark is a weak one.

In any event, even weak marks are entitled to the statutory presumptions of Section 7(b) of the Act, and hence should be protected against the registration by a

subsequent user of a nearly identical mark for closely related goods and services. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

In conclusion, we find that applicant's services are closely related to the cited goods, that the literal element of applicant's mark is identical to the cited mark in overall commercial impression, and that applicant has failed to demonstrate the weakness of the cited mark for these and related goods.

Decision: The refusal to register is affirmed.